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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LANEESHA RENAE SENEGAL,

Defendant and Appellant.

F056408

(Super. Ct. No. F07907184)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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**INTRODUCTION**

Appellant/defendant Laneesha Senegal, an office manager for a construction company, filled in three pre-signed blank checks from the company, made the checks payable to her own company, and deposited the checks into a bank account which she controlled. She was convicted after a jury trial of one count of embezzlement (Pen.

Code<sup>1</sup>, § 503); three counts of grand theft by larceny (§ 487, subd. (a)); and three counts of possession of a completed check with the intent to utter and pass and facilitate the utterance and passage of the check in order to defraud (§ 475, subd. (c)). The court suspended the sentence and placed defendant on probation for five years subject to various terms and conditions, including service of 120 days in jail, performing 250 hours of community service, and paying restitution of \$14,325.78 to her former employer.

On appeal, defendant contends her convictions for grand theft by larceny are not supported by substantial evidence, she was improperly convicted of multiple counts of larceny and possession of a completed check, she could not be convicted of both embezzlement and larceny, and the prosecution failed to carry its burden of proving the prosecution was brought within the applicable statute of limitations. We will affirm.

### **FACTS**

Larry Carpenter and Clifton Woods own and operate LC Services, a company which designs, builds, and maintains gasoline stations. They started their business in 1995. In 2000, the company had about 20 employees. By 2003, LC Services had grown to 45 employees, with yearly revenue of approximately \$10 million. The company had a business office and a 5,000 square foot warehouse and workshop.

Defendant was hired by LC Services in 1999 and served as the office manager. Defendant handled virtually all aspects of the company's financial affairs. She prepared the payroll and all accounts receivable, processed invoices and paid bills, wrote all the checks, and balanced the books. Carpenter and Woods were very happy with defendant's work, they trusted her, and felt she did her job well.

Carpenter testified that it was the company's standard practice for construction employees to submit purchase orders and draw checks to cover "big dollar" expenses during major construction projects. Based on the purchase order, defendant printed out a

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<sup>1</sup> All further statutory citations are to the Penal Code unless otherwise indicated.

computer-generated check on LC Services's account at Wells Fargo Bank. The checks could be signed by only Carpenter or Woods. Carpenter and Woods did not regularly pre-sign blank company checks. On occasions when they were going to be away from the office, however, they pre-signed blank checks and left them with defendant. The pre-signed checks were used when employees had emergency expenses during major construction projects, and the company did not have an account with a particular vendor. Defendant kept the pre-signed blank checks locked in her desk. If an employee presented defendant with a purchase order or invoice, she filled in the payee and the amount on the pre-signed check, gave the check to the employee, and kept track of all the documentation in the company's ledger.

Carpenter and Woods testified they gave the pre-signed blank checks to defendant because they trusted her, but they did not keep track of when they signed blank checks or which check numbers they pre-signed. There were other clerical employees who worked in the office, and defendant may have left her computer on during the day, but she was the only employee with access to blank checks, and she was responsible to make sure the checks were used for LC Services.

Carpenter testified that defendant kept track of all checks in the company's ledgers and journals, and she was the only employee who had access to the checks and the computer which generated and printed the checks. The Wells Fargo monthly bank statements were mailed to the company's accountant. The bank statements, which included the paid and canceled checks, were then sent to the company's office for Carpenter and/or Woods to review. After their review, they gave the statements to defendant to balance the books and file with their business records.

### **The checks to HGE Enterprises**

Carpenter testified that at on or about April 10, 2003, he reviewed the latest Wells Fargo bank account statement, and looked through the paid and canceled checks included in the envelope. He noticed two LC Services checks that were made out to an unfamiliar

company named “HGE Enterprises.” One check was for \$4,824 and signed by Woods. It was dated February 25, 2003, and paid out on February 27, 2003. The other check was for \$3,212 and also signed by Woods, and it was both dated and paid out on March 13, 2003. All the information on both checks—dates, payees, and amounts—was printed, except for Woods’s handwritten signatures.

Carpenter did not recognize the name “HGE Enterprises” as one of the company’s regular customers or vendors, and asked Woods about the checks. Woods recognized his signatures but he did not remember signing checks for HGE Enterprises. Carpenter and Woods went through their company’s records, invoices, and purchase orders, and they determined “HGE Enterprises” was not one of the company’s regular vendors. They could not find any purchase orders or invoices to match the checks.

Carpenter called Wells Fargo and learned another check from LC Services had been written to “HGE Enterprises.” The check was for \$13,770 and signed by Carpenter. It was dated April 4, 2003, and paid out on April 7, 2003. All the information on the check—the date, the payee, and the amount—was printed, except for Carpenter’s signature. Carpenter knew he had not signed a check made out to HGE Enterprises.

Carpenter and Woods knew they never authorized any payments from LC Services to HGE Enterprises. They became “pretty sure” defendant was involved in some type of fraudulent activity. Carpenter testified they were “pretty freaked out” because they trusted defendant, and she was a good friend and model employee. Woods was “tremendously” surprised because he trusted defendant so much.

Carpenter and Woods decided to make copies of the canceled checks written to HGE Enterprises in February and March 2003. Later, on April 10, 2003, they returned the two checks to the bank statement with the rest of the canceled checks, and placed the envelope on defendant’s desk, consistent with their regular business practice, because they wanted to see what defendant was going to do.

On April 17, 2003, Carpenter and Woods checked the bank statement they had left on defendant's desk, and looked through the canceled checks. They discovered one of the checks to HGE Enterprises was still in the envelope but the other check was not there.

Around 5:15 p.m. on April 17, 2003, Carpenter used a speakerphone and called defendant at home. Woods was present and listened to the conversation. Carpenter and defendant talked for about 15 or 20 minutes. Carpenter told defendant that they had "these checks here made out to HGE. I don't know who they are. What can you tell us about these checks . . . ." Defendant said she did not know anything about it and said "[t]hey're just checks."

Carpenter told defendant the checks were printed on the computer, "you filled them out, they went to HGE, they've been, cashed, you're responsible for these checks." Carpenter testified that after a couple of minutes, defendant said, "Yes, I'm sorry," and that she did it. Woods testified that defendant said, "Okay, yes, I took the money ... I'm sorry ...."

Carpenter asked defendant why she did it and if there was any money left to recover. Defendant said "we've spent most of the money." Defendant said she started a business with a partner called "Hourglass Entertainment," she had access to the business's bank account, her partner helped her conceal the money, and she thought her partner ran off with the money. Defendant said it was her partner's idea and she was sorry that she listened to the partner, but she never identified that person.

Defendant admitted she filled out and cashed the checks. Defendant said she was sorry, but she never said she accidentally or mistakenly filled out the checks. Carpenter asked defendant to return whatever was left. Defendant replied there was less than \$5,000 left. Defendant was crying, and said she was sorry and she was going to make it right as much as she could.

After this telephone call, defendant never returned to work and she was no longer an employee of LC Services. On April 18, 2003, defendant called Rhonda Parkes,

another employee of LC Services, and asked Parkes if she heard what happened. Parkes replied the office was informed that defendant was no longer with the company and some funds were missing. Defendant told Parkes she was sorry. Defendant also told Parkes: “I didn’t realize the impact it would have. It’s been going on for awhile and I guess I got a little greedy.”

On or about April 19, 2003, defendant gave LC Services a check for \$4,500 as restitution. The check was dated April 18, 2003. Carpenter and Woods deposited the check and it cleared.

On December 3, 2003, Detective Henry Monreal of the Fresno Police Department interviewed Carpenter and Woods about the matter, and received copies of the three checks to HGE Enterprises and defendant’s restitution check.

Woods testified that defendant called him around Christmas in December 2003. Defendant apologized for what happened and said: “I know you don’t want to see me go to jail, you know, I have kids and everything.” Woods replied that she had committed a crime and had to deal with it. Defendant started to cry and said she wanted him to forgive her, and she would do to her best “to pay you guys back.” Woods said they would see.

On the morning of December 31, 2003, Detective Monreal interviewed defendant outside her home. He advised her of the Miranda warnings, and she waived her rights and agreed to answer questions. Monreal asked her about LC Services. Defendant said “she did complete three checks from LC Services,” she did not have authorization to take the money, the checks were payable to HGE, and she did it because she was not paid enough. Defendant was regretful about taking the money and said she had been “hanging around with the wrong crowd,” but she did not say that anyone else was involved.

Monreal showed defendant the copies of the three HGE checks. Defendant said she completed the three checks herself without authorization. She deposited the checks into a Wells Fargo account for HGE, also known as Hourglass Entertainment. Defendant

said she had access to the HGE account, she took the money, and she used the money for personal matters because she was not paid enough.<sup>2</sup> Defendant never said she mistakenly or accidentally filled in the checks.

Monreal showed defendant a copy of the April 2003 check she wrote to LC Services, and asked why she gave the check to the company. Defendant said she was “regretful for taking the three checks and she had begun making restitution back to LC Services for the money she had embezzled.” Monreal did not arrest defendant, but told her that the case would be presented to the district attorney’s office.

Carpenter testified that he had 10 to 12 subsequent conversations with defendant about the money. Around June 2005, defendant told Carpenter that she was working with the district attorney’s office “to smooth the matter over to get everything, everybody happy with the situation.” Defendant promised to enter into an agreement to make monthly restitution payments to LC Services and Carpenter could take a lien on her house.

Carpenter testified he agreed not to pursue criminal charges against defendant because of her promise to make restitution. Defendant made a “good faith” restitution payment of \$2000 but she did not make any additional payments.

In 2007, defendant called Carpenter and again offered to place a lien on her property and continue the restitution agreement. Defendant said she was sorry about taking the money and asked Carpenter not to pursue criminal charges against her.

At trial, Carpenter and Woods testified they never saw defendant or anyone else fill out the three checks to HGE Enterprises, cash the checks, or deposit the proceeds. Carpenter and Woods testified they never authorized any payments from LC Services to

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<sup>2</sup> Monreal testified he initially believed that defendant also signed the names of either Carpenter or Woods on the three checks. Monreal subsequently determined that defendant filled in blank checks which Carpenter and Woods had already signed.

HGE or Hourglass Entertainment, or for defendant to make payments to her own business.

### **Defense evidence**

Defendant did not testify. A Fresno Police Officer testified about her good reputation, honesty, and community service in her neighborhood. The officer did not know about her conduct at LC Services, however, and testified that such information would change his opinion about her. Defendant's sister testified defendant was honest and trustworthy, and performed community service to help others in her neighborhood. Defendant's sister did not know the details about the underlying charges against defendant. Defendant's sister testified that about two weeks before the trial, she contacted Carpenter and offered "to pay the amount, that I wanted to take care of the situation that we were going to court," because she did not want to "lose" her sister "to something she didn't do."

Defendant was convicted of count I, embezzlement of property valued over \$400, from on or about February 7, 2003 through April 7, 2003; three counts of grand theft by larceny of money and personal property exceeding \$400 (counts II, IV, and VI) and three counts of possession of a completed check with the intent to utter and pass and facilitate the utterance and passage of the check in order to defraud (counts III, IV, and VII).

## **DISCUSSION**

### **I. Substantial evidence of grand theft by larceny.**

Defendant contends there is insufficient evidence to support her convictions in counts II, IV, and VI, for grand theft by larceny, because she did not "take" the checks as defined by section 487, subdivision (a). Defendant argues Carpenter and Woods intentionally and voluntarily entrusted her with the signed blank checks, she was authorized to possess and use the checks for company business, there was no evidence that she obtained the checks from them for any other purpose, and there was no evidence that she intended to steal money from the company when she was entrusted with the

signed blank checks. Defendant argues the court should have granted her motion to acquit on the grand theft counts, and this court must reverse the three convictions for grand theft because of insufficient evidence.

**A. Background.**

Defendant was charged with three counts of grand theft by larceny of money and personal property exceeding \$400 (§ 487, subd. (a)). The three counts corresponded to the three LC Services checks which defendant completed to HGE Enterprises (count II, February 25, 2003; count IV, March 13, 2003; count VI, April 4, 2003).

After the prosecution rested, defendant moved for acquittal and argued she was not guilty of three counts of grand theft by larceny because Carpenter and Woods voluntarily entrusted the checks to her, and there was no evidence of asportation or that she carried away money from LC Services. The prosecutor replied that asportation occurred because the checks were removed from the office, taken to a bank, and used to withdraw money from LC Services's bank account for defendant's personal benefit.

The court denied defendant's motion for acquittal as to all counts. As to the larceny counts, the court found:

“While there may be some evidence that at a point in time the defendant took or possessed particular documents, uncompleted checks with permission, there's also sufficient evidence in the record that she continued to possess or take those items and convert them in their ordinary course of use and took property without permission sufficient enough to establish the offenses of embezzlement, grand theft and conversion or forgery. . . .

**B. Analysis.**

“The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, ‘whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.’

[Citations.]” (*People v. Crittenden* (1994) 9 Cal.4th 83, 139-140, fn. 13.) “We review independently a trial court’s ruling under section 1118.1 that the evidence is sufficient to support a conviction. [Citations.] We also determine independently whether the evidence is sufficient under the federal and state constitutional due process clauses.” (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.)

“The elements of theft by larceny are well settled: the offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.]” (*People v. Davis* (1998) 19 Cal.4th 301, 305 (*Davis*).) The “taking” element of grand theft by larceny “has two aspects: (1) achieving possession of the property, known as ‘caption,’ and (2) carrying the property away, or ‘asportation.’ [Citations.] Although the slightest movement may constitute asportation [citation], the theft continues until the perpetrator has reached a place of temporary safety with the property. [Citation.]” (*People v. Gomez* (2008) 43 Cal.4th 249, 255 (*Gomez*).)

The common law crime of larceny required a ““trespass in the taking.”” [Citation.] If the owner of the property actually consents to the defendant’s taking his property, there is no trespass in the taking and hence no larceny. [Citations.]” (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1275, fn. 4 (*Brock*).) However, the act of taking personal property from the possession of another “is always a trespass *unless the owner consents to the taking freely and unconditionally* or the taker has a legal right to take the property. [Citation.] The intent to steal or *animus furandi* is the intent, without a good faith claim of right, to permanently deprive the owner of possession. [Citation.] And if the taking has begun, the slightest movement of the property constitutes a carrying away or asportation. [Citation.]” (*Davis, supra*, 19 Cal.4th at p. 305, first italics added, second italics in original.) “A key element of larceny is that the perpetrator has the intent to permanently deprive the victim of property *at the time it was taken.*” (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 363 (*Kronemyer*), italics in original.) The jury

herein was instructed with CALCRIM No. 1800, which correctly states the elements of grand theft by larceny. (*People v. Catley* (2007) 148 Cal.App.4th 500, 505.)

Defendant's convictions for grand theft by larceny are supported by overwhelming evidence. Carpenter and Woods entrusted defendant as their office manager and to handle the financial affairs for LC Services. They voluntarily and intentionally entrusted the pre-signed blank checks to defendant, she had complete control over the computer used to print the checks, and she kept the checks in her locked desk. They did so, however, based upon several undisputed conditions. Defendant was authorized to complete and issue the signed checks only when Carpenter and/or Woods were away from the office, when company employees needed to immediately purchase "big ticket" items for ongoing construction projects from vendors with whom LC Services did not have accounts, and with the expectation that employees would submit purchase orders or invoices to document the payment requests. Based on these conditions, the pre-signed blank checks remained the property of LC Services and were not given to defendant freely and unconditionally.

Defendant committed a trespassory taking each time she removed a pre-signed blank check from her desk, printed "HGE Enterprises" as the payee, filled in a large amount, took the check out of the LC Services business office, and deposited the check into an existing bank account for HGE Enterprises over which she had access and control. HGE Enterprises was not a customer or vendor for LC Services, the checks were not written to pay expenses for LC Services, defendant deprived LC Services of the money withdrawn from its account and deposited into the HGE account, and she used the money for her own personal benefit. Defendant never claimed she accidentally issued the checks or mistakenly believed HGE Enterprises was a legitimate vendor, and instead admitted she knowingly completed the checks and deposited them into HGE's bank account.

While Carpenter and Woods consented to defendant's initial possession of the checks, that consent was expressly conditioned on completing the checks only for the benefit of LC Services. They never consented to defendant's act of issuing the checks to her own company and for her own personal benefit, and defendant committed grand theft by larceny when she completed the checks, removed them from the company's office, and deposited the checks into HGE's bank account. Defendant's convictions for grand theft by larceny were not based upon her initial receipt of the pre-signed blank checks, but on her actions when she removed the checks from the secure location in her desk, wrote in HGE Enterprises as the payee, and deposited the checks into the HGE bank account. There is thus overwhelming evidence to support defendant's convictions for grand theft by larceny. (See, e.g., *People v. Catley, supra*, 148 Cal.App.4th 500, 505.)

## **II. Multiple convictions for grand theft by larceny.**

Defendant contends that even if there is substantial evidence to support her convictions for grand theft by larceny, she only should have been convicted of one count instead of three counts, because she acted pursuant to one general plan and intent to obtain money from LC Services for her own benefit. Defendant's argument is based on *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), which held that "a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]" (*Id.* at p. 519.) Defendant also contends the court should have given an instruction based on *Bailey*, and defense counsel's failure to request such an instruction constituted ineffective assistance. We will review the procedural background for defendant's argument and determine whether *Bailey* was applicable to this case.

### **A. Background**

As explained *ante*, defendant was charged with three counts of grand theft by larceny (§ 487, subd. (a)), with the three counts corresponding to the dates of the three

checks written to HGE Enterprises (count II, February 25, 2003; count IV, March 13, 2003; count VI, April 4, 2003).

After the parties rested, the court reviewed the instructions and noted that it had considered whether to give CALCRIM No. 1802, theft as part of an overall plan. The pattern instruction states:

“If you conclude that the defendant committed more than one theft, you must then decide if the defendant committed multiple petty thefts or a single grand theft. To prove that the defendant is guilty of a single grand theft, the People must prove that: [¶] 1. The defendant committed theft of property from the same owner or possessor on more than one occasion; [¶] 2. The combined value of the property was over (\$400/\$100); [¶] AND [¶] 3. The defendant obtained the property as part of a single, overall plan or objective. [¶] If you conclude that the People have failed to prove grand theft, any multiple thefts you have found proven are petty thefts.” (CALCRIM No. 1802)

The court reviewed the instruction “in some detail” and believed it only applied “where the theory is that there were multiple acts that could constitute multiple petty thefts or arise to a single count of grand theft based on the aggregate of the amount taken, the combined value.” The court decided the instruction was not applicable based on the facts of this case.

The prosecutor agreed that CALCRIM No. 1802 only applied where an employee had access “either to a till or a tip jar over a long period of time and would take 5, 10, 14, \$20 at a time, and then eventually get to the point where they’re \$400, and that’s not the facts in this case.” The court asked defense counsel about the instruction. Defense counsel replied he had no comment. The court decided the instruction was not applicable to the case.<sup>3</sup>

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<sup>3</sup> The trial court’s interpretation of CALCRIM No. 1802 was understandable, since the instruction’s primary language addresses the long-standing rule that multiple petty theft charges may be aggregated into a single felony offense of grand theft. As we will explain, *post*, *Bailey* further extended that rule so that a defendant could argue that multiple grand thefts only constituted one grand theft because they were committed

### **B. The Bailey doctrine.**

Defendant relies on *Bailey* and argues the court had a sua sponte duty to give a modified version of CALCRIM No. 1802, that the multiple counts of grand theft could be aggregated into a single count, and she was only guilty of one count because the offenses were committed pursuant to one intention, one general impulse, and one plan. In the alternative, defendant argues defense counsel was prejudicially ineffective for failing to request the instruction and failing to object to the court's decision not to give it.

Normally, every separate act that violates one or more statutes gives rise to a separate offense. (*People v. Neder* (1971) 16 Cal.App.3d 846, 851-852.) "In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227, italics in original.)

However, "in a series of takings from the same individual, there is a single theft if the takings are pursuant to one continuing impulse, intent, plan or scheme, but multiple counts if each taking is the result of a separate independent impulse or intent. [Citations.]" (*People v. Packard* (1982) 131 Cal.App.3d 622, 626 (*Packard*).) This rule is sometimes referred to as the "*Bailey doctrine*." (See, e.g., *People v. Drake* (1996) 42 Cal.App.4th 592, 596.)

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pursuant to a single overall plan or objective. While this aspect of *Bailey* is referred to in a bench note to the instruction, the rule is not easily discerned from the plain words and historical context of CALCRIM No. 1802. Trial courts would be well-served by clarifying language in CALCRIM Nos. 1802, 1803, or a supplemental instruction, which specifically addresses situations involving multiple grand thefts which might have been committed pursuant to a single overall plan or objective.

*Bailey* involved a defendant who engaged in multiple acts of petty theft, with the aggregate of the petty thefts amounting to over \$3000 in public funds over one year. At the time of her conviction, the theft of property worth more than \$200 was grand theft. (*Bailey, supra*, 55 Cal.2d at pp. 516-517.) The trial court instructed the jury that “if several acts of taking are done pursuant to an initial design to obtain from the owner property having a value exceeding \$200, and if the value of the property so taken does exceed \$200, there is one crime of grand theft, but that if there is no such initial design, the taking of any property having a value not exceeding \$200 is petty theft. [Citation.]” (*Id.* at p. 518.) Defendant was convicted of a single count of felony grand theft. (*Id.* at p. 516.) Thereafter, she moved for a new trial and argued the instruction was erroneous. The trial court granted defendant’s motion for a new trial, and the People appealed. (*Id.* at pp. 516, 517.)

*Bailey* held the jury was properly instructed and reversed the court’s order granting a new trial. (*Bailey, supra*, 55 Cal.2d at p. 520.) *Bailey* noted the uncontroverted evidence showed defendant was guilty of theft, but “the question is presented whether she was guilty of grand theft or of a series of petty thefts since it appears that she obtained a number of payments, each less than \$200 but aggregating more than that sum.” (*Id.* at p. 518.) *Bailey* held “[t]he test applied . . . in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. . . . [W]here a number of takings, each less than \$200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft. [Citations.]” (*Id.* at p. 519.) *Bailey* further explained:

“Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and *a defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and*

*distinct and were not committed pursuant to one intention, one general impulse, and one plan.* [Citation.]” (*Ibid.*, italics added.)

*Bailey*’s “single-intent-and-plan doctrine or test” has been consistently applied to theft cases involving a single victim. (*People v. Tabb* (2009) 170 Cal.App.4th 1142, 1149 (*Tabb*); *In re David D.* (1997) 52 Cal.App.4th 304, 309; *In re Arthur V.* (2008) 166 Cal.App.4th 61, 66, 68 (*Arthur V.*).) *Bailey* clearly applies to situations where separate instances of misdemeanor theft may be aggravated to a single felony grand theft. (See, e.g., *Arthur V.*, *supra*, 166 Cal.App.4th 61, 68-69; *People v. Brooks* (1985) 166 Cal.App.3d 24, 31; *People v. Slocum* (1975) 52 Cal.App.3d 867, 889.)

However, *Bailey* also has been extended to prevent a defendant from being convicted of *more* than one grand theft, where the takings were committed against a single victim with one intention, one general impulse, and one plan. Several cases illustrate the application of this aspect of *Bailey*. For example, in *People v. Richardson* (1978) 83 Cal.App.3d 853 (*Richardson*) (disapproved on other grounds in *People v. Saddler* (1979) 24 Cal.3d 671, 682), defendant was convicted of multiple felonies, including four counts of attempted grand theft, based on “a scheme whereby City of Los Angeles Controller’s warrants were obtained by an unauthorized means and made payable to fictitious commercial payees for amounts in excess of \$800,000 each.” (*Richardson*, *supra*, 83 Cal.App.3d at p. 858.) Four separate warrants were forged in favor of different fictitious payees, and were going to be separately submitted through different intermediaries for payment. (*Ibid.*)

*Richardson* relied on *Bailey* and reversed three of the four convictions for attempted grand theft, and held the facts showed as a matter of law there was only a single plan to steal more than \$3.2 million from the county. (*Richardson*, *supra*, 83 Cal.App.3d at p. 866.) “That four separate warrants were the means by which this end was to be achieved does not ‘splinter’ the crime into four separate offenses,” since the evidence showed defendant gave all four warrants to the same individual on the same

date to precipitate the unified scheme that was carried out by other individuals. (*Id.* at p. 866.)

In *Packard*, defendant was an employee of Paramount Studios, formed a fake production company, and submitted false invoices to bill the studio for the reproduction of nonexistent scripts. The studio issued checks to the fake company several times per month, and each payment was usually several thousand dollars. Over the course of three years, the studio paid defendant's fake company over \$472,000. After a bench trial, defendant was convicted of three counts of grand theft, with each count based upon invoices submitted in three consecutive years. (*Packard, supra*, 131 Cal.App.3d at pp. 625-626.) Defendant relied upon *Bailey* and argued he was only guilty of one count of grand theft as a matter of law because "the only reasonable conclusion supported by the evidence is that all the takings were pursuant to one general intent and scheme," and there was no reasonable basis to conclude he had "three separate schemes, each based neatly on calendar years, as distinguished from one general scheme or a separate theft for each invoice and payment." (*Id.* at p. 626.)

*Packard* agreed with defendant's argument and found he was only guilty of one count of grand theft as a matter of law. *Packard* acknowledged that whether there were separate independent takings or one general scheme was a question of fact based on the circumstances of each case. (*Packard, supra*, 131 Cal.App.3d at p. 626.) *Packard* noted, however, that the Attorney General did not contend there was a basis to show defendant had three separate yearly schemes. (*Ibid.*) "In the absence of any evidence from which it could reasonably be inferred that [defendant] had three separate intents and plans, the only reasonable conclusion supported by the record is that [defendant] had a single continuing plan or scheme for stealing money from Paramount. [Citation.]" (*Id.* at p. 627.)

*Bailey* was again relied on to reverse multiple theft convictions in *Kronemyer*, where defendant was an attorney who looted an elderly person's financial assets while

acting as a conservator. Defendant used four separate transactions over four days to withdraw money from several accounts, and he was convicted of four counts of grand theft. (*Kronemyer, supra*, 189 Cal.App.3d at pp. 363-364.) *Kronemyer* held that as in *Packard* and *Richardson*, defendant could only be convicted of one count of grand theft because the fact “these physically separated funds required four transactions” did not avoid application of the *Bailey* doctrine. (*Id.* at p. 364; see also *Tabb, supra*, 170 Cal.App.4th at pp. 1145-1147.)

*People v. Sullivan* (1978) 80 Cal.App.3d 16 (*Sullivan*) addressed factual situations where a trial court must grant a defense request for a *Bailey* instruction. In *Sullivan*, defendant was convicted of 12 counts of grand theft based on a scheme when he cashed several checks endorsed by multiple victims. The trial court refused to give a defense instruction based on *Bailey*. (*Id.* at pp. 18-19.) On appeal, defendant argued the trial court should have given the *Bailey* instruction because the evidence supported the inference that the grand theft offenses were based on one general impulse, one intention, and one plan. (*Id.* at p. 18.) The People acknowledged *Bailey*’s holding but cited to cases decided prior to *Bailey*, which found substantial evidence of separate offenses, and argued defendant could not “cumulate separate grand thefts on grounds of a single intent or plan.” (*Id.* at p. 20.)

*Sullivan* held the trial court should have given the requested defense instruction, and rejected the People’s reliance on the cases decided prior to *Bailey*. *Sullivan* noted that *Bailey* reviewed the earlier cases and noted those convictions would not have been affirmed “‘had the evidence established that there was only one intention, one general impulse, and one plan.’ [Citation.] Thus, the Supreme Court in *Bailey* did not construe the cases as the respondent interprets them.” (*Sullivan, supra*, 80 Cal.App.3d at p. 20.)

*Sullivan* also held substantial evidence supported the *Bailey* instruction:

“The evidence did not compel the conclusion that only one offense was involved in the takings alleged in [the multiple grand theft counts].

However, since *substantial evidence* exists to this effect, the trial court erred in failing to give the instruction requested by [defendant], which would have permitted the jury to pass upon the question of whether the acts were committed pursuant to one general intent or impulse and one plan.” (*Sullivan, supra*, 80 Cal.App.3d at p. 21, italics added.)

A more recent case which rejected defendant’s reliance on *Bailey* is *People v. Mitchell* (2008) 164 Cal.App.4th 442 (*Mitchell*), where defendant obtained personal identification information from elderly victims, and used that information for her personal benefit. (*Id.* at pp. 446-449.) She was convicted of multiple offenses, including two counts of misdemeanor wrongful use of personal information (§ 530.5, subd. (a)), based on using a person’s driver’s license to obtain merchandise at two different stores on two different occasions. (*Id.* at pp. 454-455.) Defendant argued the two counts only constituted one offense under *Bailey* because there was only “a single acquisition of the drivers licenses, and [defendant’s] use thereof was motivated by a single plan to use [the victim’s] identification when passing stolen checks and credit cards to obtain merchandise ....” (*Id.* at p. 455.)

*Mitchell* rejected defendant’s *Bailey* argument based on the express language of section 530.5, subdivision (a), which prohibited the “use” of personal identification information for an unlawful purpose, and held multiple convictions were appropriate because “each separate use constitute[d] a new crime” pursuant to the statute. (*Mitchell, supra*, 164 Cal.App.4th at p. 455.)

“In deciding whether a defendant commits a series of thefts pursuant to a single intent or plan, we do not use a single, broad objective of stealing property. A defendant who steals from multiple victims over a lengthy crime spree may have a single objective of obtaining as much money or property as possible. However, he has still committed multiple offenses. [Citations.] As the California Supreme Court explained in [*People v. Rabe* (1927) 202 Cal. 409], ‘[w]here the proof in a given case is sufficient to show the existence of a fraudulent intent or purpose on the part of an accused to obtain property from another by false or fraudulent representations, *the making of the first false representations which moved or induced the person to whom they were made to part with his property*

*does not immune the defrauding person from punishment for subsequently obtaining from said person other property which was parted with under the influence of the fraudulent representations which were still operating upon the mind of the defrauded person at the time he passed his property into the hands of said designing person.’ [Citation.]*

“By parity of reasoning, a single theft of personal identifying information and use of that information to obtain property will not immunize the thief from prosecution for subsequent uses of the information to obtain other property.” (*Mitchell, supra*, 164 Cal.App.4th at p. 456, italics added.)

### **C. Analysis.**

Defendant relies on *Bailey*, *Packard*, and *Richardson*, and argues she was improperly convicted of three counts of grand theft by larceny, and two of the convictions must be reversed. As explained *ante*, the question of whether multiple takings are committed pursuant to one intention, general impulse, and plan is a question of fact for the jury based on the particular circumstances of each case. (*Bailey, supra*, 55 Cal.2d at p. 519; *Packard, supra*, 131 Cal.App.3d at p. 626; *People v. Slocum, supra*, 52 Cal.App.3d 867, 888-889; *Arthur V., supra*, 166 Cal.App.4th at p. 69.) On appeal, we uphold the fact finder’s conclusion on the question if that conclusion is supported by substantial evidence. (*Tabb, supra*, 170 Cal.App.4th at pp. 1149-1150.) Where the evidence supports only one reasonable conclusion as to whether the defendant had one intention, general impulse, and plan, the question may be resolved as a matter of law as to whether the defendant should only be convicted of one count of theft. (*Packard, supra*, 131 Cal.App.3d at pp. 626-627.) “[I]ssues of fact become those of law where . . . the facts are undisputed and permit of only one conclusion. [Citations.]” (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 985.)

We decline to find as a matter of law that defendant was only guilty of one count of grand theft as found in *Packard* and *Richardson*. Defendant used the same means to steal money from LC Services, by completing pre-signed blank checks to HGE Enterprises, and she told Carpenter that she did so because she believed she was not paid

enough. However, she committed the grand thefts at separate times and by completing the checks for vastly different amounts. While she made out the checks to her own business, HGE Enterprises, there was no evidence that she created HGE for the purpose of facilitating the thefts from LC Services, or that she opened the HGE bank account just to deposit the checks from LC Services. Instead, the only evidence about HGE Enterprises was based on defendant's statements that she was a partner in a business, she had access to the business's bank account, she deposited the checks into that bank account, it was her partner's idea to take the money, and her partner used almost all the money that was taken from LC Services. In addition, defendant told her coworker that she had become greedy, the third check was for nearly three times as much as the first check, and her conduct occurred over three months, thus raising the inference that she had a separate and distinct intent each time she completed a blank check and deposited it to HGE's account. In contrast to *Packard*, there was no evidence that defendant created an entity as part of a larger scheme to steal money from her employer, such that we cannot find that the *Bailey* doctrine would apply to this case as a matter of law.

Defendant contends the court had a sua sponte duty to give the *Bailey* instruction in this case. A trial court's duty to instruct sua sponte on particular defenses arises ““only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.’ [Citations.]” (*People v. Barton* (1995) 12 Cal.4th 186, 195, italics added.)

As applied to the instant case, there may have been some evidence to support a *Bailey* instruction if defendant had requested it, but the entirety of the record implies defense counsel did not request a *Bailey* instruction because it would have been contrary to the defense theory of the case. Defense counsel extensively cross-examined Carpenter and Woods during the trial and established that other clerical employees shared office space with defendant, defendant may have left her computer on and unattended during

the day, and Carpenter and Woods did not know whether the other clerical employees could have accessed the computer to print out checks whenever defendant stepped away from her desk. Defense counsel also established that based on the company's regular procedures, defendant was authorized to complete the pre-signed checks whenever an employee produced an invoice or purchase order for items needed on construction projects.

Based on this evidence, defense counsel used closing argument to assert that defendant was innocent of all the charges. Defense counsel argued there was no direct evidence that defendant filled in the checks, endorsed them, and used the money. Counsel argued the three checks to HGE Enterprises could have been issued by another clerical employee who gained access to defendant's computer, or defendant could have innocently issued the checks based on another employee's presentation of fraudulent invoices. Defense counsel also argued the prosecution failed to establish the corpus delicti for the charged offenses, such that defendant's statements to Carpenter, Woods, Detective Monreal, and her coworker could not be relied upon as admissions, and Carpenter and Woods were eager to blame defendant for the problem.

The entirety of the record thus establishes the trial court did not have a sua sponte duty to give a *Bailey* instruction because the instruction would have been inconsistent with defendant's theory that she was innocent of all charges. (*People v. Barton, supra*, 12 Cal.4th 186, 195.)

#### **D. Ineffective Assistance**

In the alternative, defendant contends counsel's failure to request the *Bailey* instruction constitutes prejudicial ineffective assistance under the facts of this case. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

“If ‘counsel’s omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.’ [Citation.] When, however, the record sheds no light on why counsel acted or failed to act in the manner challenged, the reviewing court should not speculate as to counsel’s reasons. To engage in such speculations would involve the reviewing court “‘in the perilous process of second-guessing.’” [Citation.]” (*People v. Diaz* (1992) 3 Cal.4th 495, 557-558.)

Based on defense counsel’s closing argument, counsel may have had a tactical reason not to request a *Bailey* instruction, or object to the court’s decision not to give or modify the instruction, since counsel argued defendant was innocent of the charges. However, even assuming defense counsel was ineffective in failing to request the *Bailey* instruction, we cannot find counsel’s failure was prejudicial. As in *Sullivan*, there was some evidence to support a *Bailey* instruction, but we cannot say that there is a reasonable probability that the result would have been different if the *Bailey* instruction was given because all the evidence points to defendant committing a crime of opportunity rather than methodically executing a scheme against her employer. The only common factor in the three grand thefts was defendant’s use of the same means to commit the offenses, by completing pre-signed blank checks to HGE Enterprises as the payee. But defendant committed the offenses by completing three checks for vastly different amounts. She completed the checks over a three month period, and weeks apart from each other. Defendant used two checks signed by Woods and one check signed by Carpenter. Carpenter and Woods testified they pre-signed checks if they were going to be away from the office for a substantial length of time, and defendant’s use of checks

signed by both men demonstrates that she took advantage of the occasions when one or the other man was away from the office and left blank checks with her.

While defendant deposited all the checks into a bank account for HGE Enterprises, there is no evidence that she created HGE or the bank account as part of a larger plan to steal money from her employer. Defendant told Carpenter that she started a business called “Hourglass Entertainment,” she had a partner, they both had access to the bank account, and it was her partner’s idea to take the money.

We thus conclude that even if defense counsel should have requested a Bailey instruction, counsel’s omission was not prejudicial given the nature and circumstances of the offenses in this case.

### **III. Multiple convictions for possession of a completed check.**

Defendant was convicted in counts III, V, and VII of violating section 475, subdivision (c), possession of a completed check with the intent to utter and pass and facilitate the utterance and passage of the check, in order to defraud, with each count based upon a separate check. Defendant contends she was improperly convicted of three violations of section 475, subdivision (c) because all three completed checks involved the same victim.<sup>4</sup>

Defendant’s argument is based upon a series of cases which held a defendant could only be convicted of one count of possession of a blank or completed check. As we will explain, however, the defendants in those cases were found in possession of all the checks at the same time. In *People v. Bowie* (1977) 72 Cal.App.3d 143 (*Bowie*), defendant was convicted of eleven counts of possession of blank checks with intent to defraud, based on a scheme where defendant possessed eleven checks drawn on a defunct

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<sup>4</sup> The *Bailey* doctrine has not been extended to forgery offenses as defined in section 475. (*People v. Drake, supra*, 42 Cal.App.4th 592, 595-596; *People v. Neder, supra*, 16 Cal.App.3d 846, 852-853.)

organization in the same amount. Defendant agreed to sell the checks to an undercover agent, with the intent for the agent to fill in the checks and pass them to others. (*Id.* at pp. 146-147.) *Bowie* held defendant only should have been convicted of a single offense because he “possessed all 11 checks at the same time,” even though there were different potential victims. (*Id.* at p. 156.)

In *People v. Carter* (1977) 75 Cal.App.3d 865 (*Carter*) (superceded by statute as stated in *People v. Todd* (1994) 22 Cal.App.4th 82, 86), defendant and a companion were suspected of passing fake checks at a store. Their vehicle was searched and they were found in possession of three fraudulent checks. The checks were drawn on the same account, made out to three different payees, and were going to be used to defraud the payees. (*Id.* at pp. 868-869, 871.) Defendant was convicted of three counts of possession of a completed check with fraudulent intent, based on the three checks. *Carter* relied upon *Bowie* and held defendant’s simultaneous possession of multiple checks with the requisite intent only constituted one offense, even though the checks were made out to different payees. (*Id.* at pp. 871-872.)

In *People v. Morelos* (2008) 168 Cal.App.4th 758 (*Morelos*), officers executed a search warrant at a house and found sheets of blank checks, check-printing software, sheets of currency, various forms of identification, and credit cards. Defendant was convicted of multiple felonies, including 15 counts of forgery of blank checks involving six different victims (§ 475, subd. (b)). (*Id.* at pp. 761-762, 764.) On appeal, defendant argued all but one blank check count had to be reversed; the People countered that only multiple convictions involving the same victims should be stricken. (*Id.* at p. 763.) *Morelos* held that *Bowie* and *Carter* required reversal of all but one count, even though there were different victims, since the defendant was found in possession of all the checks at the same time. (*Id.* at p. 765.)

Defendant contends that as in *Bowie*, *Carter*, and *Morelos*, her single act of possessing three completed checks constituted only one statutory violation of possession

of a completed check, since the three checks involved the same victim, LC Services. Defendant's reliance on these cases is misplaced since it was undisputed that the defendants in *Bowie*, *Carter*, and *Morelos* were found in possession of all the checks, with the requisite intent, at the same time. The evidence in the instant case compels the contrary inference and strongly suggests there were three separate instances of possession. As discussed *ante*, Carpenter and Woods entrusted the signed blank checks to defendant pursuant to the condition that she could only complete the checks for company business, and they did not record when they pre-signed each check. During her telephone call with Carpenter, defendant admitted that as to each check, she filled in the amount and HGE Entertainment as the payee, and she deposited the check into HGE's bank account. The bank records for LC Services showed the three checks were deposited on three separate dates. Thus, there is no evidence that defendant possessed the three particular checks with the requisite intent at the same time. Instead, the evidence establishes that she possessed the checks at three separate times with the requisite intent. Defendant was properly convicted of three counts of possession of a completed check.

#### **IV. Convictions for embezzlement and grand theft by larceny.**

As discussed *ante*, we have found substantial evidence supports defendant's convictions for grand theft by larceny but that she could only be convicted of one count as a matter of law under *Packard* and *Richardson*. Defendant next contends that she cannot be convicted of both embezzlement in violation of section 503, and grand theft by larceny in violation of section 487, subdivision (a), because embezzlement is no longer an independent crime, and embezzlement and larceny have been combined into the single statutory definition of theft.

Defendant's argument is based upon the history and derivation of the theft and larceny statutes. "Prior to the amendment of . . . section 484 in 1927, the criminal law recognized three types of nonforcible takings of the property of another: larceny, a common law crime, and the statutory offenses of embezzlement and obtaining title by

false pretenses. [Citations.]” (*Brock, supra*, 143 Cal.App.4th 1266, 1274-1275.) After the 1927 amendment, the Legislature “consolidated the offenses of larceny, larceny by trick, obtaining money by false pretenses, embezzlement, and related theft offenses, in section 484 as the single crime of ‘theft.’ [Citations.]” (*People v. Sanders* (1998) 67 Cal.App.4th 1403, 1416 (*Sanders*); *Gomez, supra*, 43 Cal.4th at p. 254, fn. 4.) Section 484, subdivision (a) thus states:

“Every person who shall feloniously *steal, take, carry*, lead, or drive away the personal property or another, *or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person* of money, labor or real or personal property, or *who causes or procures others to report falsely* of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.” (Italics added.)

“In an effort to further clarify its intent to bring all of the theft crimes under one umbrella,” section 490a was also enacted in 1927. (*Sanders, supra*, 67 Cal.App.4th at p. 1416.) It states:

“Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.”

While the purpose of these legislative changes was to “‘remove technicalities’ that existed in the pleading and proof of theft crimes which existed at common law [citation], it was also determined that none of the elements of the several crimes assembled under the term ‘theft’ had been changed. [Citation.]” (*Sanders, supra*, 67 Cal.App.4th at p. 1416.)

“A practical consequence of the 1927 amendments was to permit the charging of the crime of theft, regardless of the common law theory, by alleging that the defendant unlawfully took the property of another [citation] . . . . This rule of simplicity in pleading does not alter the elements of proof required. Those elements depend upon the type of theft committed. [Citation.] [¶] . . . . [S]implicity in pleading is not mirrored

by simplicity in proof. Simplicity in pleading does not replace the requirement that the elements of a legislatively defined crime must be established by the evidence. [Citations.]” (*Sanders, supra*, 67 Cal.App.4th at p. 1416, fn. 18.)

The combination of “several common law crimes under the statutory umbrella of ‘theft’ did not eliminate the need to prove the elements of the particular type of theft alleged. [Citations.]” (*Sanders, supra*, 67 Cal.App.4th at pp. 1416-1417.) “Although the offense of theft has been substituted for the offenses of larceny, embezzlement and obtaining money or property by false pretenses, no elements of the former crimes have been changed. The elements of the former offenses of embezzlement and larceny and the distinction between them” continue to exist. (*People v. Tullos* (1943) 57 Cal.App.2d 233, 237-238; *Davis, supra*, 19 Cal.4th at p. 304.)

Thus, even after the amendment of section 484, “elements of the several types of theft included within section 484 have not been changed.” (*People v. Ashley* (1954) 42 Cal.2d 246, 258; *Brock, supra*, 143 Cal.App.4th at p. 1275.)

Defendant contends that based upon the merger of the theft offenses in section 484, she can only be convicted of one act of theft, and embezzlement is merely another theory of theft and not an independent offense. Defendant’s argument is meritless because the elements of embezzlement and larceny, and the distinction between them, continue to exist. (*People v. Tullos, supra*, 57 Cal.App.2d 233, 237-238; *Davis, supra*, 19 Cal.4th at p. 304.) As discussed in section I, *ante*, the offense of grand theft by larceny, in violation of sections 484 and 487, subdivision (a), is committed by every person “who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away. [Citations.]” (*Davis, supra*, 19 Cal.4th at p. 305.) We have already found that defendant’s convictions for grand theft by larceny are supported by substantial evidence.

As for embezzlement, defendant was convicted in count I of grand theft by embezzlement, from on or about February 7, 2003, to April 7, 2003, in violation of section 503. “Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted.” (§ 503.) “Embezzlement requires conversion of trusted funds coupled with the intent to defraud. [Citations.] An intent to deprive the rightful owner of possession even temporarily is sufficient and it is no defense that the perpetrator intended to restore the property nor that the property was never ‘applied to the embezzler’s personal use or benefit.’ [Citations.]” (*In re Basinger* (1988) 45 Cal.3d 1348, 1363-1364.) “The crime of embezzlement requires the existence of a ‘relation of trust and confidence,’ similar to a fiduciary relationship, between the victim and the perpetrator. “‘If the relation is that of creditor and debtor merely, an appropriation by the latter does not constitute embezzlement.’” [Citation.]” (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845; *People v. Creath* (1995) 31 Cal.App.4th 312, 318.)

There is overwhelming evidence to support defendant’s conviction for embezzlement. Carpenter and Woods entrusted defendant, the general office manager for LC Services, with the entirety of their company’s financial matters. Defendant had complete control and access over the company’s checkbook, she paid all bills and the payroll, kept the ledgers and journals, and handled all the invoices and purchase orders. She was the only employee with access to the computer which was used to print out the company’s checks. On occasions when they were going to be out of the office, Carpenter and Woods signed blank checks and left them in defendant’s custody and control, with directions to use those checks as needed to handle expenses for ongoing construction projects, provided the requesting employee presented an invoice or purchase order in support of the request for funds. On three separate occasions in February, March, and April 2003, defendant used the blank checks signed by Carpenter and Woods, and filled in the payee as HGE Enterprises, her own business. The checks were deposited and paid out to the bank account of HGE Enterprises, and defendant had access to that bank

account. Defendant's conviction for embezzlement in violation of section 503 is clearly supported by overwhelming evidence.

Finally, we note that a defendant may not be convicted of both a greater and a lesser included offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) This court only considers the statutory elements of the offenses in determining whether a defendant has been improperly convicted of multiple charged offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1231.) While embezzlement and grand theft by larceny are both species of the crime of theft (see § 490a), neither one is a lesser included offense of the other because each contains elements not contained in the other offense. (Compare CALCRIM No. 1800 with CALCRIM No. 1806.) Grand theft by larceny requires that certain money, labor or real or personal property be "taken" by the defendant. (§ 487, subd. (a); CALCRIM No. 1800.) By contrast, the chapter of the Penal Code relating to embezzlement clarifies that "[a] distinct act of taking is not necessary to constitute embezzlement." (§ 509.) Further, the crime of embezzlement has as one of its elements that property has been fraudulently appropriated by "a person to whom it has been entrusted." (§ 503; see CALCRIM No. 1806.) Grand theft by larceny does not require fraudulent appropriation or an entrustment of property to the defendant. (§ 487, subd. (a); see CALCRIM No. 1800.)

Defendant was properly convicted of both grand theft by embezzlement and grand theft by larceny.

## **V. Statute of limitations**

Defendant raises several issues as to whether the instant prosecution was brought within the applicable statute of limitations. In order to address her contentions, we must review the procedural history of this case, defendant's objections raised during the trial as to the statute of limitations, and the trial court's ruling on these issues.

As we will explain, the court and the parties mistakenly believed the prosecution was "commenced" by the filing of the felony complaints in this case, whereas the

prosecution was “commenced” within the meaning of section 804 by the issuance of arrest warrants. The felony complaints were filed on the same day as the arrest warrants were issued in this case, however, and the entirety of the record establishes, without dispute, the prosecution in this case was timely commenced within the applicable statute of limitations.

**A. The limitations period**

“When a defendant challenges the timeliness of a prosecution, he or she may move to dismiss the charges before trial on the ground that the prosecution is time-barred as a matter of law . . . . [Citations.]” (*People v. Moore* (2009) 176 Cal.App.4th 687, 693 (*Moore*)).) When the defendant asserts the statute of limitations defense before trial, he or she bears the burden of proving the limitations period has expired as a matter of law. When the defendant fails to establish the statute has run as a matter of law, a motion to dismiss must be denied. (*Ibid.*)

After making a pretrial motion, the defendant may also assert the defense as a fact-based issue at trial. (*Moore, supra*, 176 Cal.App.4th at p. 693.) As a general rule, the trial court need only instruct on the statute of limitations when it is placed at issue by the defense as a factual matter in the trial. (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1192 (*Smith*)).) The statute of limitations is not an element of the crime, and the prosecution bears the burden of proving by a preponderance of the evidence that the case is not barred by the statute of limitations. (*People v. Castillo* (2008) 168 Cal.App.4th 364, 369 (*Castillo*)).)

When an appellate court is reviewing a statute of limitations question after a conviction for the charged offenses, the proper question is whether the record demonstrates that the crime charged actually fell within the applicable statute of limitations. (*Smith, supra*, 98 Cal.App.4th at pp. 1192-1193.) If the statute of limitations issue has been tried to a jury, the question on appeal is whether the jury’s implied

findings are supported by substantial evidence. (*Castillo, supra*, 168 Cal.App.4th at p. 369.)

As explained *ante*, defendant was charged with grand theft by embezzlement, grand theft by larceny, and possession of a completed check with intent to defraud. Section 803, subdivision (c) states that a four-year statute of limitations applies to offenses in which a material element “is fraud or breach of a fiduciary obligation,” and specifically includes “grand theft of any type” and forgery. (§ 803, subd. (c)(1).) “Crimes not specifically delineated are included under [section 803, subdivision (c)’s] umbrella as long as the crimes have as their core, or a material element of the crime is, fraud or breach of a fiduciary obligation. [Citations.]” (*People v. Guevara* (2004) 121 Cal.App.4th 17, 25 (*Guevara*).)

The parties herein agree that the statute of limitations applicable to the charges in this case is four years pursuant to section 801.5 and section 803, subdivision (c). (See, e.g., *Moore, supra*, 176 Cal.App.4th at p. 692; *Guevara, supra*, 121 Cal.App.4th at p. 25; *People v. Price* (2007) 155 Cal.App.4th 987, 996 (*Price*); *People v. Thorbourn* (2004) 121 Cal.App.4th 1083, 1086.)

We next turn to when the limitations period began to run in this case and whether the period could have been tolled. Section 801.5 states that prosecution of “any offense described” in section 803, subdivision (c) “*shall be commenced* within four years after discovery of the commission of the offenses . . . .” (Italics added.) Section 803, subdivision (c) also states the four-year statute of limitations “does not commence to run until the discovery of the offense. . . .”

As for tolling, section 803, subdivision (b) states that “[n]o time during which *prosecution* of the same person for the same conduct *is pending* in a court of this state is a part of the limitation of time . . . .” The statute of limitations is thus tolled when the prosecution is pending, and “a prosecution cannot be ‘pending’ unless it has commenced” as defined in section 804. (*People v. Angel* (1999) 70 Cal.App.4th 1141, 1148 (*Angel*).)

At the time the offenses in this case were committed, section 804 stated a prosecution was “commenced” when “any of the following” events occurred: (a) when an indictment or information was filed; (b) a complaint was filed charging a misdemeanor or infraction; (c) a case was certified to the superior court; or (d) “[a]n arrest warrant or bench warrant [was] issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.” (Historical and Statutory Notes, 50 (1) West’s Ann. Pen. Code (2008) foll. § 804, p. 293; Historical and Statutory Notes, 50 (1) West’s Ann. Pen. Code (2009 supp.), foll. § 804, p. 9; see also *Angel, supra*, 70 Cal.App.4th at pp. 1145-1146.)<sup>5</sup>

As applicable to the instant case, the parties agree the offenses were discovered by Carpenter and Woods on April 17, 2003, when they called defendant and she admitted that she completed and deposited the checks to HGE Enterprises. The four-year statute of limitations began to run on that day, and would have expired on April 17, 2007. The period would have been tolled if the prosecution “commenced” by any of the events set forth in the version of section 804 applicable at the time—the filing of an indictment or information, the filing of a misdemeanor complaint, certification of the case to superior court, or issuance of an arrest warrant or bench warrant for the defendant. (See, e.g.,

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<sup>5</sup> At the time the instant offenses were committed, the filing of a felony complaint did not commence the prosecution. (*People v. Terry* (2005) 127 Cal.App.4th 750, 764 & fn 5.) Effective January 1, 2009, section 804, subdivision (c) was amended to include the defendant’s arraignment “on a complaint that charges the defendant with a felony” as one of the events which commences the prosecution. (Stats. 2008, ch. 110 (SB 610), § 1; Historical and Statutory Notes, 50 (1) West’s Ann. Pen. Code (2009 supp.), foll. § 804, p. 9.) The parties agree the current version of section 804 does not apply to the instant case since the amendment occurred after defendant committed the offenses in this case. (See, e.g., *Angel, supra*, 70 Cal.App.4th at p. 1145, fn. 4.) The amended version of section 804, subdivision (c) would not change the instant analysis since there is no evidence defendant was arraigned on the first felony complaint.

*Angel, supra*, 70 Cal.App.4th at pp. 1145-1146; *People v. Terry, supra*, 127 Cal.App.4th at p. 764.)

With these legal principles in mind, we turn to the procedural history of this case, defendant's trial and appellate arguments about whether the instant prosecution was brought within the four year statute of limitations period, and whether the interim period was tolled in any way.

### **B. Procedural history**

On April 2, 2004, a felony complaint was filed against defendant in Fresno County Superior Court case No. F04902302-9, charging her with a felony violation of section 508, embezzlement by a clerk, agent, or servant of another, from on or about February 7, 2003, through April 7, 2003, by unlawfully and fraudulently appropriating property "which had been entrusted to her in the course of her employment as a clerk, agent or servant of LC Services." A handwritten notation on the complaint states "AW" and "5000."

It is reasonable inferred from the record that on April 2, 2004, an arrest warrant was issued against defendant in case No. F04902302-9. The augmented record<sup>6</sup> contains a certified copy of a document from Fresno County Superior Court which states "[t]he affidavit for warrant of arrest has been reviewed and the warrant is approved for service" on defendant, on April 2, 2004, for the complaint charging her with a violation of section 508, embezzlement, with bail set at \$5,000. The document contains a description of defendant, her address, her vehicle, and that Larry Carpenter of LC Services was the complaining witness. The document is signed by Judge Kazanjian. The augmented record contains a certified copy of another document from the Fresno County Superior Court, an "arrest warrant information," which states the arrest warrant was issued as to

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<sup>6</sup> As we will discuss *post*, we granted the Attorney General's motion to augment the appellate record with certified copies of documents from the superior court files.

defendant on April 2, 2004, bail was set at \$5,000, and the warrant was issued by Judge Kazanjian.

On May 12, 2004, defendant was released on bond in case No. F04902302-9.

On August 5, 2005, the court granted the prosecution's motion to dismiss case No. F04902302-9 without prejudice, based on defendant's letter promising to repay the victims. The minute order states the bond was exonerated.

On September 20, 2007, the felony complaint was refiled against defendant, charging her with a violation of section 503, embezzlement, on or about February 7, 2003, through April 7, 2003. The refiled complaint was assigned case No. F07907184. A handwritten note on the complaint states "AW."

It is reasonably inferred from the record that an arrest warrant was again issued for defendant on September 20, 2007. The augmented record contains a certified copy of a document from Fresno County Superior Court which states "[t]he affidavit for warrant of arrest has been reviewed and the warrant is approved for service" on defendant, on the complaint charging her with a violation of section 503, embezzlement, with bail set at \$5,000. The document contains a description of defendant and her address, and states the complaining witness was the "Fresno Police Department." A handwritten note on the document states: "Refiling." There were two case numbers on the document: F04902302-9, corresponding to the complaint filed on April 2, 2004; and F07907184, corresponding to the complaint filed on September 20, 2007. The document is signed by Judge Vogt and dated September 20, 2007.

On November 19, 2007, defendant was arraigned and pleaded not guilty to embezzlement in case No. F07907184. The minute order states that the warrant issued for defendant on September 20, 2007, was recalled.

### **C. Pretrial motions.**

On May 21, 2008, the parties confirmed the preliminary hearing for the single charge of embezzlement. Defendant argued the prosecution was barred by the statute of

limitations. The court ordered further briefing on the matter and continued the preliminary hearing.

Thereafter, defendant filed a motion to dismiss for lack of jurisdiction based on the statute of limitations and argued the applicable statute of limitations was four years after the discovery of the offenses, based on sections 801.5 and 803, and more than four years had passed since the offenses were discovered in April 2003. The prosecutor filed opposition and a jurisdictional statement as to the statute of limitations. The prosecutor set forth the history of the case: an initial report about the crime was generated with the Fresno Police Department on April 18, 2003, the complaint was filed on April 2, 2004, and the complaint was dismissed without prejudice on August 5, 2005, because defendant filed a contractual letter with the court stating that restitution would be paid. The prosecutor asserted the complaint was refiled on September 20, 2007, after LC Services reported defendant failed to pay restitution. The prosecutor argued the statute was tolled when the original complaint was filed and then dismissed, that three years one month and one day had run, and the prosecution was valid under the four-year statute of limitations.<sup>7</sup>

On May 29, 2008, the court convened the preliminary hearing and noted that the parties agreed the applicable statute of limitations was four years. The prosecutor and defense counsel concurred and the court did not discuss the matter further. The court conducted the preliminary hearing and held defendant to answer.

On June 10, 2008, the information was filed in case No. F07907184, which charged defendant with one count of embezzlement, three counts of grand theft by larceny, and three counts of possession of a completed check.

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<sup>7</sup> As we will discuss *post*, the prosecutor mistakenly believed the filing of the felony complaints tolled the statute of limitations and did not address whether arrest warrants had been issued in both cases.

#### **D. Trial motions**

On September 15, 2008, defendant's jury trial began. The court stated it had reviewed the case file and noted the original complaint was filed in April 2004 as case No. F0490232-9, it was dismissed in August 2005, the complaint was refiled on September 20, 2007, defendant was held to answer on May 29, 2008, and the information was filed on June 10, 2008. The court further noted the original complaint was dismissed "as part of an agreement for restitution," and the complaint was refiled when defendant failed to fully pay restitution.

Defendant requested the court instruct the jury that the prosecution had the burden of proving that it complied with the applicable statute of limitations. The prosecutor objected to the proposed instruction because the matter was "previously litigated" at the preliminary hearing, and the court found the case was not barred by the four-year statute of limitations. The prosecutor argued that if the court was going to give the defense instruction, then it was entitled to introduce evidence to prove the statute of limitations had not run and explain why the original complaint was dismissed.

The court asked defense counsel if he intended to litigate the statute of limitations as a disputed question at trial. Defense counsel said he did not intend to file further motions, but argued the prosecution still had the burden of proving compliance with the statute of limitations regardless of the court's prior ruling on the matter.

The court overruled the prosecutor's objection and held CALCRIM No. 3410, the pattern instruction on the statute of limitations, was appropriate because the prosecutor still had the burden of proof on that issue. The court further held the prosecutor could introduce evidence as to the procedural history of the case for the jury to determine the statute of limitations issue.

#### **E. Stipulation and instruction**

During the course of trial, the parties agreed to a stipulation about the procedural history of the case and the statute of limitations. The court decided to modify the pattern

instruction on the statute of limitations to insert the relevant procedural dates. The prosecutor asked the court to modify the pattern instruction to explain the limitations period was tolled during the period that the first complaint was filed and pending against defendant. Defense counsel suggested additional language, that the period between April 2004 and August 2005 did not apply against the limitations period, since the first complaint was pending at that time. The court decided to redraft the instruction to clarify the procedural history.

After the prosecution rested, the court read the following stipulation to the jury, as agreed to by the parties:

“On April 18, 2003, the Fresno Police Department became aware of a possible embezzlement at LC Services involving the defendant . . . . On April 2nd, 2004, the District Attorney’s Office filed a criminal Complaint against the defendant. On August 5th, 2005, the District Attorney’s Office dismissed the criminal Complaint. *It is further stipulated by the parties that the time between April 2nd, 2004, and August 5th, 2005, was tolled and does not count against the applicable statute of limitations pursuant to Penal Code Section 803(b).*

“On September 20th, 2007, a new Complaint was filed by the District Attorney’s Office and has remained filed until present day. *It is further stipulated the statute of limitations was tolled from September 20th, 2007, to present pursuant to Penal Code Section 803(b).*”

At the conclusion of the evidence, the court instructed the jury on the statute of limitations:

“A defendant may not be convicted of any charged crime or lesser included offense unless the prosecution began within four years of the date the crimes were discovered or should have been discovered. The present prosecution began on September 20th, 2007. *The initial prosecution in this case began on April 2nd, 2004. That initial prosecution terminated with a dismissal of the case on August 5th, 2005. The present prosecution in this case began when the case was refiled on September 20th, 2007. In determining whether the prosecution of this case began within four years of the date the crimes were discovered or should have been discovered, the time period between April 2nd, 2004, and August 5th, 2005, does not count against the four year limitation.*

“A crime should have been discovered when the victim or law enforcement officer was aware of facts that would have alerted a reasonably diligent person or law enforcement officer in the same circumstances to the fact that a crime may have been committed. The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of this case began within the required time. If the people have not met this burden, you must find the defendant not guilty of any of the charged crimes or lesser included offenses.” (Italics added.)

Defendant did not object to the stipulation or the instruction, and she was convicted of all charged offenses.

#### **F. The Attorney General’s Motion to Augment**

In the instant appeal, defendant argues the entire prosecution was barred by the statute of limitations and defense counsel improperly agreed to the stipulation and the instruction as to this case’s procedural history. Defendant agrees the applicable limitations period for the charged offenses was four years, pursuant to sections 801.5 and 803, subdivision (c). However, defendant argues the court and the parties mistakenly believed a prosecution commenced upon the filing of a felony complaint. Defendant points out that the version of section 804 applicable at the time the offenses were committed stated a prosecution commenced upon the filing of a misdemeanor complaint, an indictment or information, or the filing of an arrest warrant. Defendant argues that none of the events set forth in section 804 occurred, such that the limitations period was not tolled between the filing of the first felony complaint and the dismissal of that complaint, the instant case did not commence until the information was filed in September 2007, more than four years had passed since the offenses were discovered in April 2003, and the entire case should have been dismissed. Defendant further argues defense counsel was prejudicially ineffective for failing to realize these defects, and this court must reverse all her convictions because the statute of limitations was violated.

In response to defendant's appellate contentions, the Attorney General filed a motion with this court to augment the appellate record with certified copies of documents from the superior court files in case Nos. F04902302-9 and F07907184, the first and second cases filed against defendant, as relevant to the statute of limitations issue. The certified documentary exhibits include documents from which it can be concluded that arrest warrants were issued in case No. F04902302-9 on April 2, 2004, and in case No. F07907184 on September 20, 2007. The certified documentary exhibits also include the felony complaint filed on April 2, 2004 in case No. F04902302-9; the May 12, 2004, minute order, in case No. F04902302-9 which stated that defendant posted bond and was released; and the August 5, 2005, minute order in case No. F04902302-9, which stated the complaint was dismissed without prejudice.

The Attorney General argued these documents were from the superior court files and could be augmented to the appellate record. The Attorney General further argued the documents were "relevant to dispute [defendant's] claim that the statute of limitation bars her convictions," but does not declare whether exhibits 2 and 7 are the actual arrest warrants issued in this case.

Defendant filed opposition to the People's motion to augment and argued the documentary exhibits did not resolve the statute of limitations issue. Defendant argued four of the five exhibits were from the superior court file in the first case, No. F04902302-9, whereas the instant appeal was taken from the second case, No. F07907184. Defendant argued the documentary exhibits were never before the trial court or the jury in the present case, and could not be augmented to the instant appellate record. Defendant did not challenge the validity or accuracy of any of the documentary exhibits.

This court issued the following order as to the People's motion to augment:

"As [defendant] does not question the authenticity of the documents at issue in the Attorney General's 'Motion to Augment the Record on Appeal' filed on September 29, 2009, this court will consider the documents to be accurate copies of what the Attorney General represents them to be, and

grants the Attorney General's 'Motion to Augment the Record on Appeal.' This court will decide how or if the documents will be used when the appeal is decided on its merits."

#### **G. Appellate review of limitations period**

As we attempt to untangle the statute of limitations issue, we must review the manner in which an appellate court may resolve factual and legal issues as to whether a prosecution commenced within the applicable limitations period. Where the evidence is not in dispute and we need not make any factual determinations on the record before us, we may independently resolve the statute of limitations issue on appeal, even if such evidence was not before the jury. (See *In re White* (2008) 163 Cal.App.4th 1576, 1582-1583; *Price, supra*, 155 Cal.App.4th at p. 998; *Castillo, supra*, 168 Cal.App.4th at p. 377.)

"[W]hen the trial court determines that certain counts are not time-barred, defendant's convictions as to those charged offenses will stand if the reviewing court can determine from the available record, including both the trial record and the preliminary hearing transcript, that the action is not time-barred despite the prosecution's error in filing an information in which those counts appeared to be time-barred." (*Smith, supra*, 98 Cal.App.4th 1182, 1189.)

If there are undisputed facts providing a basis for tolling the limitations period, it is immaterial that such facts were neither expressly pleaded or proved. (*People v. Lewis* (1986) 180 Cal.App.3d 816, 821-822 (*Lewis*).) "Nothing in the case law requires reversal or retrial for jurisdictional defects when those defects are as a matter of law cured on the undisputed record. [Citation.] ....To decide otherwise ... would be to require further proceedings at the trial level which could be of no legal benefit to the [defendant] but which would most certainly waste his time and the taxpayers' money." (*People v. Posten* (1980) 108 Cal.App.3d 633, 648-649; see also *People v. Williams* (1999) 21 Cal.4th 335, 345 (*Williams*).)

For example, the defendant in *Lewis* raised the statute of limitations issue for the first time on appeal. *Lewis* resolved the issue by considering an arrest warrant which was

not in evidence at trial but which was part of the appellate record. Defendant did not challenge the validity or accuracy of the warrant. (*Lewis, supra*, 180 Cal.App.3d at pp. 820-822.) *Lewis* relied on the warrant and held the prosecution commenced before the limitations period expired. (*Id.* at pp. 820-821.) *Lewis* further held the prosecution's failure to plead and prove facts at trial to show the timely commencement of the action was not prejudicial error:

“ . . . This is so because the issuance of a valid warrant for defendant's arrest shortly after the commission of the crime is an undisputed fact and the issuance of the arrest warrant tolled the limitations period as a matter of law. The existence of an event tolling the period being an undisputed fact, the error in failing to plead that event or to prove it to the jury is harmless.” (*Id.* at p. 821.)

*Lewis* concluded it would be a waste of resources to remand the case for a predestined result. (*Id.* at p. 821.)

A similar result was reached in *Price*, where defendant was convicted of burglary, raised the statute of limitations issue for the first time on appeal, and argued the limitations period was three years instead of four years. (*Price, supra*, 155 Cal.App.4th at p. 991 & fn. 2.) While the case was pending on appeal, the Attorney General filed a motion to augment the appellate record with print-outs of relevant minute orders and “the felony complaint for the arrest warrant.” (*Id.* at p. 997, fn. 10.) *Price* granted the augmentation motion over defendant's objection, noted defendant did not challenge the validity of the documents, and found that one of the orders in the augmented record stated that an arrest warrant was issued on a particular date. (*Ibid.*)

*Price* relied on the augmented record and held that the arrest warrant was issued, and the prosecution was commenced, “well before either a three- or four-year limitations period expired.” (*Price, supra*, 155 Cal.App.4th at p. 997.) *Price* rejected defendant's argument that an appellate court could not review the augmented record to determine whether the charges were timely. *Price* held that when such a review requires resolution

of disputed factual questions, then the matter should be remanded to the trial court. (*Id.* at p. 998.) *Price* explained that it was not required to make any factual determinations to find that the limitations period was not violated, because “[t]he record clearly shows that the arrest warrant was issued ... well before any applicable limitations period.” (*Ibid.*)

#### **H. Analysis.**

Defendant contends her convictions must be reversed because the prosecution failed to prove this case was commenced within the applicable limitations period, and the court incorrectly instructed the jury on the consideration of the limitations period. As in *Price* and *Lewis*, however, the entirety of the undisputed record establishes that any errors committed by the trial court were necessarily harmless because the instant prosecution was commenced within the applicable limitations period.

The offenses herein were discovered on April 17, 2003, and the applicable statute of limitations is four years from the date of discovery. The limitations period would have ended on April 17, 2007, unless that period was tolled by the prosecution being “commenced,” as defined in the version of section 804 applicable at the time the offenses were committed. (*Angel, supra*, 70 Cal.App.4th at p. 1150.)

It is also undisputed that the issuance of a valid arrest warrant “commences” a prosecution for purposes of the statute of limitations. (*Guevara, supra*, 121 Cal.App.4th at p. 24; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 369; *Price, supra*, 155 Cal.App.4th at p. 997; *Angel, supra*, 70 Cal.App.4th at p. 1146; *Lewis, supra*, 180 Cal.App.3d 816, 821.)

The augmented record strongly establishes that an arrest warrant was issued in the first case on April 2, 2004, the same day that the felony complaint was filed. The first felony complaint contains a notation that an arrest warrant was issued and bail set at \$5,000. The augmented record contains a document signed by Judge Kazanjian, that an arrest warrant was issued on April 2, 2004, along with a description of defendant, that it

was based on the complaint for a violation of section 508, Carpenter was the complaining witness, and bail was set at \$5,000.

The prosecution “commenced” and the statute of limitations was tolled when the arrest warrant was issued on April 2, 2004. (*Price, supra*, 155 Cal.App.4th at p. 997.) The statute of limitations does not run during the time a criminal action is pending. (*Angel, supra*, 70 Cal.App.4th at p. 1148.) The statute was tolled from April 2, 2004, to August 5, 2005, when the first complaint was dismissed without prejudice.

The limitations period was running from August 5, 2005, to September 20, 2007, when an arrest warrant was issued against defendant on the same day the felony complaint was refiled in the second case. The record herein strongly implies the second arrest warrant was filed on September 20, 2007. The refiled felony complaint was assigned case No. F07907184, and contains a handwritten note that says, “AW.” The augmented record contains a document which states an arrest warrant was issued on September 20, 2007, along with a description of defendant, that it was based on the complaint for a violation of section 503, and bail was set at \$5,000. A handwritten note on the document states: “Refiling.” There were two case numbers on the document: F04902302-9, corresponding to the complaint filed on April 2, 2004; and F07907184, corresponding to the complaint filed on September 20, 2007. The document is signed by Judge Vogt and dated September 20, 2007. When defendant was arraigned on November 19, 2007, the minute order states the court recalled the warrant that had been issued on September 20, 2007.

Thus, the issuance of the second arrest warrant on September 20, 2007, again “commenced” the prosecution and tolled the statute of limitations. (*Price, supra*, 155 Cal.App.4th at p. 997.) The statute remained tolled throughout the prosecution of the instant action. As explained by the Attorney General, a period of four years five months and four days passed from the discovery of the offenses on April 17, 2003, to the commencement of the second prosecution when the second arrest warrant was issued on

September 20, 2007. During that time, however, the limitations period was tolled for one year four months and four days, between the issuance of the first arrest warrant on April 2, 2004, and the dismissal of the first complaint on August 5, 2005. The actual elapsed time under the limitations period was three years and one month.

As in *Price* and *Lewis*, the entirety of the undisputed record before this court establishes the instant prosecution was commenced within the four-year limitations period pursuant to section 804.

Defendant complains that the stipulation and instruction which were given to the jury in this case effectively amounted to a directed verdict on the limitations issue, and the matter must be reversed because the stipulation and instruction incorrectly stated that the limitations period was tolled by the filing of the felony complaints, instead of through the issuance of arrest warrant. The court and the parties drafted the stipulation and instruction based on the mistaken belief that the prosecution commenced through the filing of the felony complaints.

However, the stipulation and instruction contained the *correct dates* the prosecution was commenced and the limitations period was tolled, since the arrest warrants were issued on the same dates the felony complaints were filed. Thus, the jury was correctly instructed as to the actual dates the limitations period was tolled. The stipulation correctly stated that “the time between April 2nd, 2004, and August 5th, 2005, was tolled and does not count against the applicable statute of limitations ....” and the limitations period “was tolled from September 20th, 2007 to present ....” The instruction correctly stated that the “initial prosecution began on April 2nd, 2004,” it terminated on August 5, 2005, the “present prosecution began on September 20, 2007,” and that “the time period between April 2nd, 2004, and August 5th, 2005, does not count against the four year limitation, and the “present prosecution began on September 20th, 2007.”

Based on the documents in the augmented record, we find the errors in the stipulation and instruction were harmless because the jury was informed as to the correct

dates the limitations period was tolled. More importantly, however, the augmented record demonstrates the instant prosecution was commenced well within the four-year statute of limitations, based on the issuance of the arrest warrants in the first and second cases. As in *Price* and *Lewis*, we find defendant was not convicted in violation of the statute of limitations. The trial court's errors involved questions of law as to the application of section 804, that the prosecution commenced with the issuance of the arrest warrants and not by the filing of the felony complaints. Since this is a question of law, this court may review the entirety of the record and find the statute of limitations was complied with. (*Castillo, supra*, 168 Cal.App.4th at p. 375.)

Moreover, there is no due process impediment to reviewing an undisputed record to resolve the limitations issue. "Due process requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial. [Citations.]" (*People v. Tardy* (2003) 112 Cal.App.4th 783, 786.) Defendant had notice of the statute of limitations issue in the trial court and the issue was thoroughly litigated. The record before us permits review and resolution of the issue as a matter of law based on undisputed facts. (*In re White, supra*, 163 Cal.App.4th 1576, 1582-1583.)

Defendant raises several objections to this court's ability to review the appellate and augmented records and resolve the statute of limitations issue as a matter of law. First, she contends this court improperly granted the Attorney General's motion to augment the record because the documentary exhibits were not before the trial court in this case. Defendant points out that the instant appeal is from case No. F07907184, whereas most of the documentary exhibits in the augmentation motion are from case No. F04902302-9, which was dismissed.

As in *Price*, this court properly augmented the record with documents from the superior court files, defendant has not challenged the validity or accuracy of those documents, and this court may consider the documents. (*Price, supra*, 155 Cal.App.4th

at p. 997 & fn. 10.) In addition, the entirety of the appellate record suggests the files for both case numbers, along with the relevant documents, were before the trial court since it referred to both case numbers when it reviewed the procedural history of the prosecution.

Defendant next argues that even if the documentary exhibits in the augmented record were before the trial court, such exhibits were not introduced at trial, the jury did not consider these exhibits, and both the stipulation and instruction on the statute of limitations were incorrect. Defendant adds that defense counsel was ineffective for failing to realize the legal errors contained in the stipulation and instruction, and argues that her convictions must be reversed and the matter remanded because the jury's implied rejection of the statute of limitations issue was based on a stipulation and instruction which were legally incorrect, the jury never considered the factual question about the statute of limitations based on competent evidence, and this court cannot review the record and make a determination on the issue as a matter of law.

As explained in *Price* and *Lewis*, however, an appellant court may properly review the undisputed documents in the public record and determine as a matter of law that a limitations period did not expire. While the court and parties correctly agreed that the applicable limitations period was four years, and the period was tolled during the pendency of the first case, they mistakenly believed the prosecution was commenced in the first and second cases upon the filing of the felony complaints. As we have explained, however, the record establishes the arrest warrants were issued on the same dates as the felony complaints were filed, such that the jury was given the correct dates to determine whether the limitations period had been tolled.

Defendant further contends this court cannot consider the documentary exhibits contained in the Attorney General's motion to augment because many of the documents are from the file in the first case, and the two cases are not related for purposes of determining when the prosecution was commenced and the limitations period was tolled. This argument is without merit. "The statute of limitations problem sometimes arises in

the situation where the charges are dismissed and the prosecutor reinstitutes the prosecution by filing a new accusatory pleading charging offenses which are different from but related to those in the dismissed pleading.” (*People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1659, fn. 8.) However, when an action is dismissed and refiled after the period of limitations, the prosecutor may charge offenses “based on the ‘same conduct’ as the dismissed action because the filing of the original action tolls the statute of limitations not only as to those offenses charged in the original action, but also as to offenses based on the ‘same conduct.’” (*Id.* at p. 1659; *Angel, supra*, 70 Cal.App.4th at p. 1149.)

As applied to the instant matter, the two cases herein were clearly based on the “same conduct.” The first arrest warrant asserted that a complaint was filed against defendant for a violation of section 508, embezzlement by a clerk, agent, or servant. The second arrest warrant asserted a complaint was filed against defendant for a violation of section 503, grand theft by embezzlement. Both allegations were based on defendant’s conduct in completing the blank checks and using the money for her own benefit, based on a specific period of time between February and April 2003.

Defendant relies on *People v. Le* (2000) 82 Cal.App.4th 1352 (*Le*), and argues this court cannot determine as a matter of law the statute of limitations period was tolled between two different prosecutions. In *Le*, defendants were alleged in a complaint to have committed various felony offenses. Arrest warrants for the defendants issued on June 12, 1992, alleging they committed grand theft, insurance fraud, and other felonies, between May 1, 1987, and February 15, 1990. (*Id.* at p. 1355.) An indictment was returned on October 28, 1993, again alleging grand theft, insurance fraud, and other felonies committed in the same time span. Defendants were tried on the indictment, which alleged: “‘This prosecution [was] commenced by the issuance of an arrest warrant ... on June 12, 1992, within the meaning of ... Section 804.’” (*Ibid.*) After the prosecution rested, defendants moved for acquittal on the ground that the prosecutor had

failed to prove that the statute of limitations had not run. The trial court permitted the prosecution to reopen its case, introduce the arrest warrants into evidence, and call an investigator, who testified that he obtained the arrest warrants, the facts stated in the affidavit for the warrants were the same facts that were covered by the indictment and trial, but the case tried under the indictment had a different case number from the case for which he had obtained the warrants because the earlier case had been dismissed before a preliminary hearing was held. More importantly, the investigator did not know when the dismissal occurred. (*Id.* at pp. 1355-1356.) The parties agreed the applicable limitations period was three years, and the indictment did not issue within three years of the alleged offenses, but the disputed issue was whether the arrest warrants tolled the limitations period. (*Id.* at pp. 1356-1357.)

*Le* clarified that the issue was whether the evidence presented by the prosecution at trial adequately proved that the statute of limitations had not run. The Attorney General relied on *Lewis* and argued the prosecution met its burden of proof by showing that the warrants had issued within three years of the offenses. (*Le, supra*, 82 Cal.App.4th at p. 1357.) *Le* disagreed and noted *Lewis* was decided under former section 802.5, which had referred to the issuance of an arrest warrant as “tolling” the statute of limitations, whereas the statutes that replaced section 802.5 described issuance of an arrest warrant as “commencing” a prosecution (§ 803), and further described “tolling” as nonexistent, except that “[n]o time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time ....” (§ 803, subd. (b).) (*Le, supra*, 82 Cal.App.4th at p. 1358.) *Le* agreed with the defendants’ argument that under sections 803 and 804, “the issuance of the arrest warrant began the tolling period arising from a ‘prosecution of the same person for the same conduct.’ [Citation.] The statute of limitations would be tolled for the time ‘during which prosecution ... [was] pending.’ [Citation.] *The defect in the prosecution’s proof ... is it did not establish the length of the tolling period. To meet its burden of proof, the*

*prosecution needed to prove the time during which the other prosecution was pending, when subtracted from the time between the commission of the offenses and the issuance of the indictment, yields a period less than three years.” (Id. at pp. 1357, 1359, italics added.)* *Le* refused to interpret sections 803 and 804 as permitting the issuance of a single arrest warrant to commence all original and subsequent prosecutions of the same conduct. (*Id.* at p. 1359.) *Le* reversed defendants’ convictions because the prosecution failed to prove the duration of the “tolling” period, defendants did not concede the relevant facts at trial or on appeal, and the appellate record did not contain undisputed facts as to that issue. (*Id.* at pp. 1361-1362.)

*Le* additionally found that “even if the tolling period were undisputed, the prosecution would not be entitled to an affirmance.” (*Le, supra*, 82 Cal.App.4th at p. 1360.) In doing so, however, *Le* reached “an unnecessary issue,” its discussion of the issue “is dicta because the tolling period was not undisputed,” and the issue “appears never to have actually been raised by the parties.” (*Castillo, supra*, 168 Cal.App.4th at p. 379.) *Le* even “acknowledged the Attorney General had not argued that an error in pleading or proof regarding the statute of limitations could be cured by the undisputed facts in the appellate record; the court itself raised the issue and considered the argument to ‘give him the benefit of the doubt.’ [Citation.]” (*Ibid.*)

In contrast to *Le*, the entirety of the appellate and augmented records show that separate arrest warrants were issued in the two cases, which commenced the prosecutions and tolled the limitations period. Also in contrast to *Le*, defendant has not challenged the validity, accuracy, or existence of the arrest warrants, merely that the documentary exhibits “fall short because they relate to the first case and cannot be relied on by augmentation in this case to establish the facts not presented at the trial.”

We thus conclude the entirety of the undisputed record establishes the instant prosecution was commenced within the applicable limitations period, and any errors

committed by the trial court in the stipulation and instruction are harmless beyond a reasonable doubt.

**DISPOSITION**

The judgment is affirmed.

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Poochigian, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Gomes, J.